

In the Matter of)
)
Broadband Industry Practices.) WC Docket No. 07-52
)

February 28, 2008

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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Broadband Industry Practices.)	WC Docket No. 07-52
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**REPLY COMMENTS OF THE
NEW JERSEY DIVISION OF RATE COUNSEL**

I. INTRODUCTION AND SUMMARY

A. INTRODUCTION

The New Jersey Division of Rate Counsel (“Rate Counsel”)¹ hereby replies to the initial comments submitted in response to petitions by Vuze, Inc. (“Vuze”)² and Free

¹ / Effective July 1, 2006, the New Jersey Division of Ratepayer Advocate is now the New Jersey Division of Rate Counsel. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is a Division within the Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jerseyans who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Christine Todd Whitman’s Reorganization Plan. The mission of the Ratepayer Advocate is to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory. In addition, the Ratepayer Advocate works to insure that all consumers are knowledgeable about the choices they have in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (N.J.S.A. §§ 52:27EE-1 et seq.). The Department is authorized by statute to “represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest,” N.J.S.A. § 52:27EE-57, i.e., an “interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens.” N.J.S.A. § 52:27EE-12. The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

Press et al. (“Free Press”).³ Rate Counsel welcomes the continuation of the critically important dialog concerning broadband industry practices that is occurring in this docket.⁴

B. SUMMARY

As stated in comments filed in this docket last year, “Rate Counsel has consistently opposed the prospect of industry acting as gatekeeper to the Internet.”⁵ The two petitions before the commission allege that broadband service providers in general, and Comcast Corporation (“Comcast”) in particular, are effectively deciding which services and applications are available to consumers, by degrading or delaying data packets of some types of protocols. This situation, if true, undermines the usefulness of the Internet, and diminishes the value and utility that consumers derive from it. The importance of this issue is clear from the wide range of groups and individuals submitting

² / *In the Matter of Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators; Broadband Industry Practices*, WC Docket No. 07-52, Petition for Rulemaking, November, 14, 2007 (“Vuze Petition”).

³ / *In the Matter of Free Press et al. for a Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management"; Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review - Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities; Broadband Industry Practices*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, WC Docket No. 07-52, Petition for a Declaratory Ruling of Free Press, Public Knowledge, Media Access Project, Consumer Federation of America, Consumers Union, Information Society Project at Yale Law School, Professor Charles Nesson, Co-Director of the Berkman Center for Internet & Society, Harvard Law School, Professor Barbara van Schewick, Center for Internet & Society, Stanford Law School, Petition for Declaratory Ruling, November 1, 2007 (“Free Press et al Petition”).

⁴ / Rate Counsel submitted initial comments in this docket on June 15, 2007 and reply comments on July 16, 2007, but did not submit initial comments responding to the petitions of Vuze and Free Press et al.

⁵ / *In the Matter of Broadband Industry Practices*, WC Docket No. 07-52, Comments of the New Jersey Division of Rate Counsel, Filed June 15, 2007 (“Rate Counsel June 2007”), at 4.

comments in this docket, including cable and telephone companies, telecommunications industry organizations, consumer advocates, free speech advocates, a group of graduate students in the Computer Systems Strategy and Management Program at Northwestern University, retired network engineers, and others. In these reply comments, Rate Counsel reiterates the recommendations made in earlier comments, that the Federal Communications Commission (“FCC”, or “Commission”) should (1) adopt a fifth broadband principle, to protect net neutrality; (2) establish net neutrality requirements through a rulemaking proceeding to strengthen the Commission’s ability to enforce the principle, including the adoption of fines and the threat of license withdrawals; (3) require Internet access providers to provide consumers with clear information about any limits that the providers may have on downloading, as well as pricing practices and time limits on introductory rates; and (4) monitor the practices of broadband providers, analyze consumer complaints carefully, and collaborate with state regulators to assess the status of the market.⁶

II. THE COMMISSION SHOULD ADOPT A FIFTH PRINCIPLE TO PROTECT NET NEUTRALITY

A. DEFINITION OF NET NEUTRALITY

It is apparent from some of the comments submitted in this docket that the industry is still working out what “net neutrality” actually means, as well as the proper scope of this proceeding. AT&T Inc.’s (“AT&T”) statement that Free Press seeks a “flat ban” on network management⁷ is incorrect, just as a “flat ban” on network management

⁶ / Rate Counsel June 2007, at 4-8.

⁷ / AT&T, at 24.

does not explain the goal of net neutrality. The Reason Foundation also gives a too-bleak view of the goals of net neutrality.

[N]etwork neutrality, or other regulations that would limit the ability of service providers to manage their networks would diminish the quality and reliability that very large applications providers will need for their broadband services to work properly. This in turn would chill investment and slow deployment, because consumers would find the broadband experience to be mediocre at best.⁸

Rate Counsel offers an alternative, simple explanation that net neutrality means equal treatment for all packets of a given type. Contrary to the comments above, net neutrality is not a heavy-handed attempt to control network providers. It is simply a guarantee that Internet Service Providers (“ISPs”) will not favor certain traffic over other traffic for strategic business reasons.

Another misunderstanding of the goals of net neutrality arises in AT&T’s comments, in which AT&T attempts inappropriately to extend the idea of net neutrality:

[I]f the Commission were to conclude that preemptive regulation is needed to ensure “neutrality” on the Internet, it would need to start with Google. Indeed, regulation of Google would follow a fortiori from regulation of Comcast. While Comcast stands accused of “traffic-shaping,” Google has already admitted to content-shaping.⁹

AT&T’s statement reveals a fundamental misunderstanding of net neutrality, the goal of which is to allow users the freedom to choose whatever content and services they want. Trying to extend the argument to include alleged market power by Google in online searching and advertising misses the point of net neutrality. Indeed, Google could

⁸ / Reason Foundation, at 3.

⁹ / AT&T, at 40.

be held up as an example of a company that has thrived precisely *because* ISPs have until now followed, for the most part, a de facto acceptance of net neutrality. Consumers have chosen to use Google, instead of the many other search engines, and that is why Google is successful. In a world without net neutrality, an ISP would be able to slow traffic to Google, and instead would have the incentive to prioritize traffic to its own search engine.

B. THE COMMISSION SHOULD STRIVE FOR BALANCE

Rate Counsel, like several other commenters, recognizes the need for reasonable network management policies. The question then becomes, “What is reasonable?” A reasonable level of network management is that which takes into account the balance between rules that prevent some users from monopolizing bandwidth, and rules that stifle competition for Internet-based services. Verizon provides this explanation of network management practices:

[I]n response to ever-increasing demands on network capacity and the proliferation of bandwidth-intensive applications, some broadband providers use network management practices to ensure that all subscribers get a fair shot at the network’s available bandwidth. Without such practices, in some situations, the services of the vast majority of customers could be degraded by a handful of heavy users whose applications take up all available network capacity. Along the same lines, network management could be used to improve the functioning of the Internet, such as by providing prioritization to latency sensitive applications like telemedicine, voice, or streaming video, over other traffic less sensitive to such concerns.¹⁰

Vuze’s complaint is significant because it represents not the *outright blocking* of a service that competes with Comcast, but rather the degradation of a type of protocol that,

¹⁰ / Verizon, at 3.

according to Comcast, impairs the ability of others to use the Internet. Further, as the National Association of State Utility Consumer Advocates (“NASUCA”) explains, there are actually two “wrongs” under discussion here – Comcast’s discrimination against legal peer-to-peer traffic, and Comcast’s failure to disclose these activities to consumers.¹¹

Rate Counsel urges the Commission to consider that a balance is necessary among users who share bandwidth. Clearly it is not fair to allow one or a few Internet users to hog shared bandwidth, to the detriment of other users. However, it is also unfair, and deceptive, for the ISP to slow and block packets *surreptitiously*, even if such techniques are necessary for network efficiency. Instead, the ISP should have in place clear guidelines detailing what users can expect in terms of downloading and uploading capabilities. The ISP should provide clear guidance as to what particular Internet protocols and types of applications may be deprioritized in order to maintain network integrity. The major goal of net neutrality, to prevent the providers of access to the Internet from controlling the content available to users, is not incompatible with policies designed to improve network efficiency. The only danger with such policies is that they might be used as a pretext for traffic degradation based on strategic business interests rather than network efficiency. The Commission should remain vigilant against such activity.

C. NET NEUTRALITY SHOULD BE MANDATED FOR ALL ISPS

In addition to the four principles outlined in the Policy Statement, the Commission should embrace a fifth principle that protects net neutrality. The commitments made by Verizon and AT&T as part of the FCC’s approval of their

¹¹ / NASUCA, at 5.

mergers, are quickly coming to an end. Verizon's commitment to following the four principles set forth in the Commission's Broadband Policy Statement¹² expired in January 2008.¹³ AT&T's similar commitment (that the merged company will refrain from behavior contrary to the principles set forth in the Commission's existing Broadband Policy Statement) expires in June 2009.¹⁴ AT&T's commitment to a "fifth" principle, specifically "not to provide or to sell to Internet content, application, or service providers, including those affiliated with AT&T/BellSouth, any service that privileges, degrades or prioritizes any packet transmitted over AT&T/BellSouth's wireline broadband Internet access service based on its source, ownership or destination" expires in December 2008.¹⁵

Comcast, which has not previously committed to net neutrality, essentially does so in its comments.

In no event does Comcast prevent, restrict, or limit the use of applications and services using P2P protocols. This kind of network management does not deny consumers access to content, applications, services, or devices of their choosing. Comcast's network management practices *do not, have not,*

¹² / *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CC Docket No. 02-33, CC Docket No. 01-337, CC Docket Nos. 95-20, 98-10, GN Docket No. 00-185, CS Docket No. 02-52, Policy Statement, FCC 05-151, Rel. September 23, 2005.

¹³ / *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, Rel. November 17, 2005, at Appendix G.

¹⁴ / *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, Rel. March 26, 2007, at Appendix F.

¹⁵ / *Id.*

*and will not prevent its subscribers from accessing the Internet content of their choice, running applications and using services of their choice, or enjoying substantial competition among network providers, application and service providers, and content providers.*¹⁶

Rate Counsel urges the Commission to hold Comcast to this commitment, and to extend it to all ISPs. The Commission should construct a fifth, enforceable, broadband principle ensuring neutral treatment of content for all Americans.

III. THE COMMISSION SHOULD BEGIN A RULEMAKING

A. THE COMMISSION HAS THE AUTHORITY TO REGULATE INTERNET SERVICE PROVIDERS

Contrary to Comcast's arguments,¹⁷ the Commission *does* have the authority to construct and enforce a net neutrality rule, and in fact has the responsibility to do so. As Rate Counsel pointed out in previous comments,

[T]he Supreme Court has recognized the Commission's authority to regulate Internet access providers. As stated in the NOI,

- Broadband Service are "wire communications" or "radio communications," as defined by the Act.
- The Act gives the Commission jurisdiction over "all interstate and foreign communications by wire or radio."
- Section I of the Act imposes on the Commission the responsibility to ensure "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." Included in this responsibility are the tasks: "to promote the continued development of the Internet," "to preserve the vibrant and competitive market that presently exists for the Internet," and "to encourage the deployment

¹⁶ / Comcast, at 33 (emphasis added).

¹⁷ / See Comcast, at 52-54.

of technologies which maximize user control over what information is received by ... [users] of the Internet.¹⁸

Rate Counsel urges the Commission to assert its authority to commence a rulemaking to protect all broadband consumers, as well as the vitality and usefulness of the Internet.

B. THE COMMISSION SHOULD NOT WAIT FOR MORE EXAMPLES OF MISBEHAVIOR

Several commenters suggest that, instead of proceeding directly to a rulemaking, the Commission should instead consider individual cases of alleged abuse as they arise. For instance, Comcast states, “If any such problems occur, the Commission can address those problems at that time and determine whether there is a set of facts that requires some surgical intervention that the Commission has authority to implement.”¹⁹ Embarq states that the Commission “should limit itself to fact-based decisions, addressed on a case-by-case basis.”²⁰

Rate Counsel reminds the Commission that it asked for concrete examples of abuses in its original *Broadband Industry Practices NOI*,²¹ and points out that the Commission now has concrete examples to consider, from both the earlier commenting period, as well as the instant petitions.²² The Commission should not wait for more abuses, or misunderstandings, to occur before acting. A rulemaking is the appropriate

¹⁸ / Rate Counsel June 2007, at 12.

¹⁹ / Comcast, at 55.

²⁰ / Embarq, at 1.

²¹ / *In the Matter of Broadband Industry Practices*, Notice of Inquiry, WC Docket No. 07-52, Rel. April 16, 2007, at para. 8.

²² / *See, for example*, NASUCA (initial comments filed June 15, 2007), at 11-12, concerning Madison River LLC and Shaw Cable, and BT Americas (filed June 15, 2007), at 10, concerning Verizon’s blocking of iTunes in favor of V Cast.

avenue at this point, and is in the interests of all consumers. The Commission should eliminate the ambiguity surrounding net neutrality, and construct a simple enforceable rule to protect net neutrality.

IV. INTERNET SERVICE PROVIDERS SHOULD PROVIDE CONSUMERS WITH CLEAR GUIDELINES OF PERMISSIBLE USE

AT&T recommends that the Commission “encourage broadband networks to make voluntary disclosure of customer-usage limitations as consumers will experience them.”²³ Rate Counsel agrees with this suggestion, with the caveat that the disclosure of customer-usage restrictions should be *mandatory*, not voluntary, and the disclosures should be written in plain, easy to understand, language.

Rate Counsel commends Comcast on the recent revision of its user agreement. In it, Comcast attempts to explain why network management is necessary, and to define the limits of “normal usage,” citing the statistic that “the median data usage by Comcast High-Speed Internet customers is approximately 2GB each month,” and further explaining that this “reflects typical residential use of the service for purposes such as sending and receiving e-mail, surfing the Internet, and watching streaming video.”²⁴ Comcast even provides examples of “excessive usage” – for example, sending 20,000 high resolution photos, sending 40 million e-mails, downloading 50,000 songs, or viewing 8,000 movie trailers in one month.²⁵

²³ / AT&T, at 4.

²⁴ / Comcast (Attachment B), at 2.

²⁵ / *Id.*, at 1-2.

However, as Vuze observes, Comcast's revision of its user agreement comes after the fact.

Comcast's revised Terms of Service seem to suggest that it has not changed its actions; instead, it seems to have reserved the right to continue them.²⁶

Rate Counsel reiterates its recommendation that the Commission require plain language disclosures from ISPs – before traffic degradation occurs. Consumers should be able to know the limits of the services they purchase, and should be alerted if they mistakenly cross the threshold into “excessive use.” Simply delaying packets or resetting connections when consumers’ use is “excessive” without explanation is insufficient: Consumers do not have the benefit of seeing the effects of their activities on the network, and might easily confuse network management policies designed to curb congestion for poor quality services or applications. ISPs could educate consumers better about their rights and obligations. If a certain protocol is known to cause network congestion that interferes with others’ Internet usage, then consumers should be made aware that the ISP might degrade traffic of that protocol. This is *open* traffic degradation, for a legitimate purpose, in opposition to *hidden*, illegitimate traffic degradation, which could cripple a rival service provider.

V. THE COMMISSION SHOULD MONITOR BROADBAND SERVICE PROVIDERS

Although Rate Counsel acknowledges that the Internet cannot function properly without legitimate network management practices, it encourages the Commission to remain vigilant to complaints of illegitimate traffic degradation. In particular, as the American Library Association pointed out

²⁶ / Vuze, at 2.

Reasonable network management is essential to preserve the viability of the Internet. Yet, the actions of Comcast, which appear to have some validity, go way beyond any definition of “reasonable network management.” As we stated in our June filing, “ALA is very concerned that any legitimate network management will quickly lead to unacceptable packet discrimination of content not offered or controlled by the Internet provider or any associated network provider.” The actions of Comcast have justified this concern.²⁷

The incentive for ISPs to degrade intentionally the traffic of rivals is strong. An ISP with its own voice product undoubtedly would want its customers to use its own voice product instead of that of a competitor. Although Comcast states that it will not disadvantage any content, services, or applications, Vonage states that it is

critically interested in ensuring that its competitors do not use “reasonable network management” as a pretext to degrade the performance of Vonage’s service.²⁸

Rate Counsel recommends that the Commission give special attention to the fine balance that is necessary between allowing legitimate traffic management, for the benefit of all Internet users, and prohibiting illegitimate traffic degradation, the purpose of which may be simply the enrichment of network service providers. To put it another way, the ends of network efficiency must not be allowed to justify *any* means. Traffic management should not be done “on the sly,” with techniques that impersonate other users, or forge packets.²⁹

²⁷ / American Library Association, at 2.

²⁸ / Vonage, at 1.

²⁹ / See Free Press Petition, at 11-12.

VI. COMCAST'S NETWORK MANAGEMENT POLICIES

Although Comcast states explicitly that it does not degrade individual services and applications, it *does disrupt* peer-to-peer (“P2P”) traffic, like that of Vuze, in order to alleviate network congestion. Comcast states that this practice is necessary only at certain times, and only for certain users.

Comcast's network management practices (1) only affect the protocols that have a demonstrated history of generating excessive burdens on the network; (2) only manage those protocols during periods of heavy network traffic; (3) only manage uploads; (4) only manage uploads when the customer is not simultaneously downloading (i.e., when the customer's computer is most likely unattended) (“unidirectional sessions” or “unidirectional uploads”); and (5) only delay those protocols until such time as usage drops below an established threshold of simultaneous unidirectional sessions.³⁰

Although Comcast states that it delays only upload traffic, and not download traffic, Comcast fails to explain how, in a P2P arrangement, it can delay upload traffic without necessarily delaying download traffic. P2P is based upon the premise that one user's computer seeks a file from another user's computer, so a file upload must correspond with a file download. Slowing the upload must necessarily slow the download. Comcast might argue that traffic management is geographic-specific and only used at peak times, and that P2P software automatically searches for the file in another area if it encounters network congestion. However, one wonders what would happen if each ISP, if given free reign to do as it pleased, were to use this same traffic management technique on an ongoing basis. Who but the ISPs would know the actual level of

³⁰ / Comcast, at 4.

network congestion? Would P2P cease to be useful? What other technologies would be affected?

VII. POTENTIAL REMEDIES

A. P4P TECHNOLOGIES

Several commenters identify potential solutions to the problem of network congestion caused by P2P technologies. One possible solution, detailed in AT&T's comments, involves next-generation P2P technology, known as "P4P." AT&T states,

AT&T is actively engaged in a cooperative effort with a variety of P2P distribution service providers and other stakeholders to develop the next generation of peer-based distribution technologies ("P4P") that address many of the shortcomings in today's P2P services. While that effort is pending, however, current P2P technologies will continue to present a complex challenge to network engineers.³¹

While consumers wait for P4P technology, or some other technology, to be developed, the Commission should make every effort to ensure that the tenet of net neutrality is followed by all service providers. Legitimate, reasonable traffic management must not be allowed to justify anticompetitive packet discrimination.

B. TIERED PRICING

Another potential remedy for network congestion is tiered pricing, a proposal put forth by Vonage and Embarq. Under this scenario, heavy users would pay more for greater capacity. According to Vonage, tiered pricing would ensure that "users with a high demand for bandwidth bear the true cost of that demand."³² Embarq echoes this idea, stating that "network owners typically want to serve the customers that are placing

³¹ / AT&T, at 12.

³² / Vonage, at 4-5.

heavy demands on the network and impacting other customers, so they can and often do suggest other services that are more appropriate for the high-demand customers.”³³ In short, some network operators might “up-sell” a higher grade service to those who use more bandwidth. However, tiered pricing will not solve the problem of congestion that arises due to shared bandwidth. Instead, tiered pricing, as a market-based solution, is only tenable if service providers can *guarantee* a certain level of capacity to users. Without *dedicated* bandwidth for those who purchase a higher tier of service, tiered pricing simply looks like higher prices for an *unpredictable* level of service, which does nothing to solve the problem of network congestion. While tiered pricing strategies may merit further consideration, Rate Counsel cautions the Commission that access providers could use tiered pricing as an avenue to establishing higher rates for consumers. For this reason, the Commission should consider carefully any proposals for tiered pricing because such a regime could thwart the Commission’s stated goal of achieving greater broadband deployment and adoption by consumers.

VIII. CONCLUSION

In light of the recent introduction to the U.S. House of Representatives of the “Internet Freedom Preservation Act of 2008,”³⁴ some commenters might argue that the Commission should take a “wait and see” attitude to net neutrality. However, Rate Counsel encourages the Commission not to wait for Congress to act, but rather to address the instant complaints of Vuze and Free Press by clarifying which traffic management

³³ / Embarq, at 8.

³⁴ / This bill was introduced on February 12, 2008 by Representatives Edward J. Markey and Charles W. Pickering.

practices are reasonable, and which practices overstep the bounds of reason. The Commission should clarify the rights and obligations of P2P technology users. More importantly, the Commission should move forward with adopting of a net neutrality rule that will give permanent assurances to consumers and the entire broadband industry, and assert its authority to develop a net neutrality rule with “teeth,” that is enforceable. Rate Counsel also urges the Commission to continue to monitor broadband service providers and investigate complaints of alleged traffic degradation in a timely manner.

Respectfully submitted,

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